VAHANA OFFSHORE (M) SDN BHD & ORS v. MIDF AMANAH INVESTMENT BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
YUSRIN FAIDZ YUSOFF JC
[SUIT NO: WA-22M-379-03-2023]
26 JUNE 2024

Abstract – *There is a clear distinction between an ordinary amendment application and those applications made at the eve and upon the commencement of a trial. Ordinary amendments should be dealt with based on the test in Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors ('Yamaha Motor test'), ie, the amendment should always be allowed unless: (i) the application to amend is mala fide; (ii) such amendment would cause an injustice and prejudice to the other side which could not be compensated by costs; and (iii) the amendments would turn the suit from one character into a suit of an inconsistent character. With regards to 'eve of trial' amendments, in addition to the Yamaha Motor test, Hong Leong Finance Bhd v. Low Thiam Hoe and Another Appeal requires the court to assess and examine: (i) whether the applicant's affidavit provides a cogent and reasonable explanation for the delay in filing the application; (ii) whether the application to amend is not a tactical manoeuvre; (iii) whether the proposed amendment discloses full particulars to enable the court to ascertain if there is a real prospect of success in proving the same; and (iv) whether the lateness in the application to amend the pleadings could not necessarily be compensated by payment of costs.*

CIVIL PROCEDURE: *Pleadings – Amendment – Application to amend amended writ and statement of claim – Proposed amendment argued to paint true and complete picture of case – Whether ordinary amendment application or application made at eve and upon commencement of trial – Applicable test – Whether test propounded in Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors applied – Whether test propounded in Hong Leong Finance Bhd v. Low Thiam Hoe and Another Appeal applied – Rules of Court 2012, O. 20 rr. 1 & 3*

The plaintiffs had accepted the defendant's offer to arrange sukuk financing amounting to RM500 million, along with an Islamic bridging finance facility of RM55 million. Due to the defendant's alleged delay and failure to facilitate the sukuk financing, the plaintiffs commenced a suit against the defendant, seeking damages of more than RM188 million based on the defendant's alleged misrepresentation and breach of contract and ultimately, in declaring the cancellation of all securities provided by the plaintiffs towards the RM55 million Islamic bridging finance facility. The plaintiffs'

writ and statement of claim was amended without leave pursuant to O. 20 r. 1 and/or r. 3 of the Rules of Court 2012 ('ROC'), to include injunctive relief in order to prevent the defendant from taking any or further steps to enforce the securities granted by the plaintiffs in consideration of the defendant's loan ('first amendment'). The first amendment addressed 13 securities, which were furnished by the plaintiffs based on the master commodity murabahah financing agreement ('master agreement'). Based on the first amendment, the plaintiffs filed an interim injunction, *inter alia*, to restrain the defendant from enforcing the 13 securities ('injunction application'). Upon the filing of the injunction application, the defendant filed an application to fortify the undertaking of damages ('fortification application'). The injunction application was allowed. The plaintiffs later discovered that a security provided by the first plaintiff to the defendant, namely a charge for a land, was not incorporated in the amended writ and statement of claim. This additional security was given based on the terms of the supplemental master commodity murabahah financing agreement. Upon clarification, it was confirmed with the parties that the injunction order only applied to the list of 13 securities and did not extend to the charge. Pre-trial directions were given, pursuant to O. 34 of the ROC. The defendant later issued Form 16D in order to foreclose on the charge. This was followed by the filing of an originating summons ('foreclosure action'). Based on the fortification application, the required fortification order was granted, in that, the plaintiffs were to pay the sum of RM5 million to the defendant ('fortification order'). The plaintiffs appealed against the fortification order and the Court of Appeal granted a stay of execution of the fortification order pending appeal. In the present application, the plaintiffs sought to move the court to amend the amended writ and statement of claim in order to include the charge as one of the securities that formed the final relief in the plaintiffs' claim. The defendant argued that the plaintiffs delayed in making the amendment application and submitted that the tests established by the Federal Court in *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Or*s ('*Yamaha Mot*or') and *Hong Leong Finance Bhd v. Low Thiam Hoe and Another Appeal* ('*Hong Leong Finance*') were applicable and the plaintiffs failed to meet all prerequisites outlined in these two cases.

Held (allowing application):

(1) The plaintiffs' amendment application, made six months after the claim was filed and six months before the trial date, was submitted well before the threshold identified in *Hong Leong Finance*. The delay of three months was said to have occurred from the realisation of error or inadvertence, on 14 June 2023, till the filing of the amendment application, on 13 September 2023. This delay did not amount to the 'eve of trial' delay as set out in *Hong Leong Finance*. Parenthetically, the three-month delay raised by the defendant should be examined in

reference to the *bona fide* limb as set out in *Yamaha Motor*. Consequently, the applicable standard of evaluation for the current amendment application must be solely based on test established in *Yamaha Motor* and the court was not required to consider the additional considerations outlined in *Hong Leong Finance*. Having established that the applicable test pertained only to *Yamaha Motor*, the relevant factors to be examined were: (i) whether the application was *bona fide*; (ii) whether the prejudice caused to the other side could be compensated by costs; and (iii) whether the amendments would not, in effect, turn the suit from one character into a suit of another and inconsistent character. (paras 41, 43, 49 & 55)

(2) The master agreement was to be read together with the supplemental agreement, which introduced the charge. This was clear in cl. 2.1 of the supplemental agreement. The plaintiffs' decision to omit mention of the supplemental agreement in the body of their amended statement of claim was justifiable, as it aligned with their interpretation of the claim. It was entirely their discretion to structure their plaint in this manner. From the amended statement of claim, it was clear that the essence of the plaintiffs' claim was that all securities related to the loan should be considered cancelled. This necessarily included the charge which, although created in a subsequent agreement, nonetheless formed part of the master agreement. The three-month delay from the realisation of the 'inadvertence to the application' did not constitute an inordinate delay given the circumstances, considering the stage of the proceedings and the finding of no *mala fides* on the plaintiffs' part. Therefore, the proposed amendment was made in good faith, aiming to enhance the clarity and completeness of the amended writ and statement of claim and to address the real question controversy between the parties. (paras 46-48)

(3) It was correctly determined, during the clarification session, that the charge did not form part of the 13 securities. Therefore, this undermined the defendant's argument that the proposed amendment was a backdoor measure to include the charge in the existing injunction order. The foreclosure proceeding would be governed by a different and rather strict test as set out under the 'cause to the contrary' principle based on s. 256(3) of the National Land Code ('NLC'). Therefore, if an injunction is to be applied to the charge in this suit, it would need to be conducted separately and would involve a different test compared to those applicable to the initial 13 securities, none of which involved a charge under the NLC. It could be concluded that permitting the proposed amendment would not unfairly prejudice the defendant, save perhaps for the need to amend their defence. The changes were not anticipated to place the defendant at a disadvantage in presenting their defence or cause undue harm to their position in the proceedings. (paras 51, 52 & 54)

(4) The proposed amendment did not transform the nature of the suit from its original character into one that was inconsistent or fundamentally different. The inclusion of the additional security, *ie*, the charge, which was part of the facility granted to the plaintiffs, was in line with the overall nature and purpose of the amended writ and statement of claim. Such an amendment, *ie*, to include the charge which was inadvertently omitted from the amended writ and statement of claim, was necessary for determining the real question in controversy between the parties. (para 56)

Case(s) referred to:

Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 CA ***(refd)***

Apparatech (M) Sdn Bhd v. Ng Hock Chong & Anor [2006] 1 CLJ 60 HC ***(refd)***

Bourke & Another v. Favre & Another [2015] EWHC 277 ***(refd)***

Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals [2012] 2 CLJ 16 CA ***(refd)***

Cheok Swee Lee & Ors v. Loo Choo Teng & Ors [1996] 3 CLJ 433 HC ***(refd)***

CIP Properties (AIPT) Limited v. Galliford Try Infrastructure Limited (No 3) [2015] EWHC 1345 ***(refd)***

Datuk Dr Soon Choon Teck v. Datuk Robert Lau Hoi Chew & Ors [2010] 7 CLJ 931 CA ***(refd)***

Hague Plant Ltd v. Martin Hartley Hague & Others [2014] EWCA Civ 1609 ***(refd)***

Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC ***(refd)***

Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal [2015] 8 CLJ 1 FC ***(not foll)***

HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal [2004] 3 CLJ 121 CA ***(refd)***

IFCI Ltd v. Bishopgate Capital Ltd & Anor [2023] 6 CLJ 583 HC ***(refd)***

Kerajaan Negeri Selangor v. Syarikat Bekalan Air Selangor Sdn Bhd; Kerajaan Malaysia (Third Party) [2012] CLJU 979; [2012] 1 LNS 979 CA ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

MIDF Amanah Investment Bank Bhd v. Vahana Offshore (M) Sdn Bhd [2024] CLJU 31; [2024] 1 LNS 31 HC ***(refd)***

Mohd Nor Ismail v. Mohd Zain Abdullah & Anor [1987] CLJU 68; [1987] 1 LNS 68 HC ***(refd)***

Muhammad Amin Anuar v. Seow Jing Hui & Ors [2023] 8 CLJ 475 HC ***(refd)***

Palaniappan Kotayan v. Universiti Pertanian Malaysia [1995] 1 CLJ 693 HC ***(refd)***

Peh Teck Quee v. Dato' Hamzah Abdul Majid & Anor [1999] CLJU 55; [1999] 1 LNS 55 HC ***(refd)***

Phuah Beng Chooi & Ors v. Koh Heng Jin & Ors And Other Cases [2006] 8 CLJ 364 HC ***(refd)***

Poh Chee Leng & Anor v. Cheah Siew Huen & Anor [2019] CLJU 1226; [2019] 1 LNS 1226 HC ***(refd)***

Randa v. Radopile Projects CC [2012] (6) SA 126 (GSJ) ***(refd)***

Sek Ann Thong v. Tamparuli Granite Quarry (Sabah) Sdn Bhd & Anor [1997] 1 CLJ Supp 239 HC ***(refd)***

United Overseas Bank Limited v. Heap Huat Rubber Co Sdn Bhd [1993] 3 CLJ 552 HC ***(refd)***

Vahana Offshore (M) Sdn Bhd & Ors v. MIDF Amanah Investment Bank Bhd [2024] CLJU 283; [2024] 1 LNS 283 HC ***(refd)***
Wang Piao v. Lee Wee Ching [2023] SGHC 216 ***(refd)***
Wani LLP v. Royal Bank Of Scotland Plc And Another [2015] EWHC 1181 ***(refd)***
Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Ors [2008] 2 CLJ 793 CA ***(refd)***
Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(foll)***
Yoong Leok Kee Corporation v. Chin Thong Thai [1981] CLJU 75; [1981] 1 LNS 75 FC ***(refd)***

Legislation referred to:
National Land Code, s. 256(3)
Rules of Court 2012, O. 20 rr. 1, 3, 5(1), O. 34
Rules of the High Court 1980, O. 34

Civil Procedure Code 1908 [Ind], O. VI r. 17
Civil Procedure Rules 1998, r. 1.1(1), (2)(b), (e)
Rules of Court 2021 [Sing], O. 9 r. 14
Rules of Court 2014 [Sing], O. 20 r. 5

For the plaintiffs - Alex De Silva, Sundaradevan Ramachandaran & Joshua Lawson Cowie; M/s Bodipalar Ponnuduri De Silva
For the defendant - Koo Yin Soon & Sathya Kumardas; M/s Shearn Delamore

Reported by Lina E

JUDGMENT

Yusrin Faidz Yusoff JC:

Introduction

[1] This judgment pertains to the application for the amendment of the plaintiffs' amended statement of claim; specifically addressing the addition of an existing loan security which was inadvertently left out from the amended plaint. It has been said that "for truth is truth, to the end of reckoning", per William Shakespeare, Measure to Measure (Act V, Scene 1). In this spirit, the proposed amendment is argued by the plaintiffs to paint a true and complete picture of the collateral given by them in return for the defendants' loan, thereby ensuring that all pertinent facts are adequately addressed. The defendant nevertheless objects to the application on the grounds, *inter alia*, that it is not *bona fide*, belatedly made, and amounts to a tactical manoeuvre with the effect of changing the character of the dispute. The court's decision on this application will take into account the principles of justice, the necessity for a thorough adjudication of the parties' rights, and the procedural fairness extended to both sides.

A **Background Facts**

[2] The plaintiffs, intending to refinance the construction costs of their completed lift boat (currently deployed in the Kingdom of Saudi Arabia) and to finance the construction of their second lift boat, agreed to accept the defendant's offer to arrange sukuk financing amounting to RM500 million, along with an Islamic bridging finance facility of RM55 million. The plaintiffs estimated that the construction cost for each lift boat would be RM450 million.

[3] Due to the defendant's alleged delay and failure to facilitate the sukuk financing, the plaintiffs filed a suit against the defendant on 9 March 2023 seeking damages of more than RM188 million based on the defendant's alleged misrepresentation and breach of contract that occurred on 18 March 2022, and ultimately to declare the cancellation of all securities provided by the plaintiffs towards the said RM55 million Islamic bridging finance facility.

[4] On 17 March 2023, the writ and statement of claim was amended without leave pursuant to O. 20 r. 1 and/or r. 3 of the Rules of Court 2012 ('the Rules'), to include injunctive relief in order to prevent the defendant and/or their servants and/or agents from taking any or further steps to enforce the securities granted by the plaintiffs in consideration of the defendant's loan ('first amendment'). The first amendment addressed 13 securities, which were furnished by the plaintiffs based on the Master Commodity Murabahah Financing Agreement dated 9 January 2020 ('master agreement').

[5] Based on the first amendment, the plaintiffs filed an interim injunction on 20 March 2023, *inter alia*, to restrain the defendant from enforcing the aforesaid 13 securities ('the injunction application').

[6] Upon filing of the injunction application, the defendant filed an application to fortify the undertaking of damages on 5 April 2023 ('the fortification application').

[7] On 19 May 2023, my predecessor allowed the injunction application to prevent the defendant and/or their servants and/or agents from taking any or further steps to enforce the 13 securities granted ('the injunction order'). (See: *Vahana Offshore (M) Sdn Bhd & Ors v. MIDF Amanah Investment Bank Bhd* [2024] CLJU 283; [2024] 1 LNS 283; [2024] MLJU 288).

[8] The plaintiffs thereafter discovered that a security provided by the first plaintiff to the defendant, namely a charge created on 25 July 2022 *via* Presentation No. PDSC 33465/2022 ('the charge') for a land held under Geran 29094, Seksyen 86, Bandar and District of Kuala Lumpur, Negeri Wilayah Persekutuan ('the property') was not incorporated in the amended writ and statement of claim dated 17 March 2023. This additional security

is given based on the terms of the Supplemental Master Commodity Murabahah Financing Agreement dated 26 August 2022 ('supplemental agreement'). Upon clarification on 29 May 2023, my predecessor confirmed with the parties herein that the injunction order only applies to the list of securities and does not extend to the charge.

[9] On 6 June 2023, my predecessor gave pre-trial directions pursuant to O. 34 of the Rules and allocated dates for full trial on 15 February 2024, 14 March 2024, and 15 March 2024.

[10] On 16 June 2023, the defendant issued Form 16D in order to foreclose on the charge. This was followed by the filing of the Kuala Lumpur High Court Originating Summons No. WA-24FC-876-07-2023 (the 'foreclosure action') on 28 July 2023.

[11] On 25 August 2023, based on the fortification application, my predecessor granted the required fortification order in that the plaintiffs are to pay the sum of RM5 million to the defendant on or before 25 September 2023 ('fortification order'). The plaintiffs thereafter appealed against this fortification order. On 16 November 2023, the Court of Appeal granted a stay of execution of the fortification order pending appeal.

[12] Enclosure 98 is filed on 13 September 2023 to move this court to amend the amended writ and statement of claim dated 17 March 2023 in order to include the said charge as one of the securities that form the final relief in the plaintiffs' claim.

[13] On 22 December 2023, upon hearing the application, I allowed the plaintiffs' amendment and ordered them to pay RM3,000 in costs to the defendant within 14 days.

Issues

[14] The application addresses the following issues:

(i) what is the appropriate standard for evaluating an amendment application submitted six months after the claim was filed and six months prior to the commencement of the full trial ('standard of evaluation'); and

(ii) whether the plaintiffs have fulfilled the criteria of this standard ('compliance with the standard of evaluation').

Standard Of Evaluation

Counsels' Contentions On The Issue Of Standard Of Evaluation

[15] The defendant's learned counsel, Mr Koo Yin Soon, argues that the plaintiffs delayed in making the amendment application. Therefore, it is submitted that both tests established by the Federal Court in *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep)

A 428; [1983] 1 MLJ 213 (*Yamaha Motor*) as well as in *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1; [2016] 1 MLJ 301 (*Hong Leong Finance*) are applicable. It is ultimately submitted by Mr Koo that the plaintiffs have failed to meet all the prerequisites outlined in these two cases. (See paras. 13 & 14 of defendant's written submissions in encl. 149).

B **[16]** Whereas the plaintiffs' learned counsel, Mr Alex De Silva, argues that there is no delay in the application and, therefore, the applicable test would be as established in the *Yamaha Motor* case. Mr De Silva further buttressed this submission by explaining how the requirements outlined in *Yamaha Motor* are satisfied. (See para. 8 of plaintiffs' written submissions in C encl. 146).

Court's Findings On The Issue Of Standard Of Evaluation

[17] The plaintiffs' application is premised on O. 20 r. 5 of the Rules which states as follows:

D Amendment of writ or pleading with leave (O. 20, r. 5)

5. (1) Subject to Order 15, rules 6, 6A, 7 and 8 and the following provisions of this rule, the Court *may at any stage of the proceedings* allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such a manner, if any, as it E may direct.

(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of the issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so. F

(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity G of the person intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of H the counterclaim, as the case may be, he might have sued.

(5) An amendment may be allowed under paragraph (2) *notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action* in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment. I

(emphasis added)

[18] From the reading of O. 20 r. 5(1), the word "may" within it gives the court wide and unfettered discretion to decide on a case-to-case basis whenever it appears to be just to allow the amendment required in order to determine the real questions of controversy. Although such amendment is not a right; discretion of the court is to be liberally exercised by applying well-established principles. Further, the phrase "at any stage of the proceedings" is not without significance. The word "proceedings" is also to be interpreted liberally to align with the basic purpose of the proper ventilation of the dispute between the parties, encompassing the appellate stage.

[19] In its implementation, the Federal Court in *Yamaha Motor* outlined the following core considerations for an application to amend:

> Three basic questions should be considered to determine whether injustice would or would not result, *(1) whether the application is bona fide; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.* [See *Mallal's Supreme Court Practice* page 342], If the answers are in the affirmative, an application for *amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts* as a cause of action in respect of which relief has already been claimed in the original statement of claim. (emphasis added)

[20] Therefore, as a general rule, any amendment prior to the delivery of the decision (provided it satisfies *Yamaha Motor*'s test) would be allowed. In *Datuk Dr Soon Choon Teck v. Datuk Robert Lau Hoi Chew & Ors* [2010] 7 CLJ 931; [2009] 3 MLJ 785, Sulaiman Daud JCA held that the judge has a wide discretion to amend pleadings and that as a matter of general principle, leave to amend is readily given at any stage of the proceedings, however late, provided that it causes no injustice to the parties. This general principle was referred to in the recent case of *IFCI Ltd v. Bishopgate Capital Ltd & Anor* [2023] 6 CLJ 583; [2023] 12 MLJ 111, where Liza Chan J held that the delay in amending the pleadings were accepted as the court considered that delay in making the application did not constitute an inordinate delay to reflect any lack of *bona fide.*

[21] Hence, there is no cavil that the court, under O. 20 r. 5 of the Rules, has the authority and jurisdiction to permit amendments to the pleadings at any stage, provided these amendments are just and necessary for the final resolution of the case between the parties. (See *HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal* [2004] 3 CLJ 121; [2004] 4 MLJ 398, *Cheok Swee Lee & Ors v. Loo Choo Teng & Ors* [1996] 3 CLJ 433; [1996] MLJU 266, *Peh Teck Quee v. Dato' Hamzah Abdul Majid*

& Anor [1999] CLJU 55; [1999] 1 LNS 55; [1999] MLJU 543, *Abdul Johari Abdul Rahman v. Lim How Chong & Ors* [1997] 1 CLJ 361; [1997] 1 MLJ 629, *Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Ors* [2008] 2 CLJ 793; [2008] 2 MLJ 69, and *Yoong Leok Kee Corporation v. Chin Thong Thai* [1981] CLJU 75; [1981] 1 LNS 75; [1981] 2 MLJ 21).

[22] With the introduction of the pre-trial case management in the year 2000 under O. 34 of the Rules of the High Court 1980 (22 September 2000) and now under O. 34 of the Rules of Court 2012 (1 August 2012), the following question of law was deliberated by the Federal in *Hong Leong Finance*:

> 1. (a) Whether the principles in *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* (*supra*) are the sole consideration in deciding **an application made on the eve of the trial,** to amend pleadings to introduce a new case.
>
> (b) If the answer to Question 1(a) is in the negative, what are the principles a court should properly apply, in deciding such an application *in lieu* of the *Yamaha Motor* principles?
>
> 2. Where an appellate Court, after full trial of an action, allows a statement of defence to be amended to introduce a new and distinct defence, should the Court as a consequence ordinarily direct:
>
> (a) a new trial only in respect of the issues arising from the new defence; or
>
> (b) a new trial of all the issues, including those that have already been tried and decided by the High Court. (emphasis added)

[23] In *Hong Leong Finance*, based on *Yamaha Motor*'s test, the High Court's decision to dismiss the defendant's amendment was reversed by the Court of Appeal. The Federal Court nevertheless overturned the Court of Appeal's decision and affirmed the High Court's dismissal of the amendment application. In answer to the first question of law (question 1(a) & (b)), the Federal Court in *Hong Leong Finance* ruled as follows:

> [33] Having considered the facts and the circumstances of the present case, our views are as follows:
>
> (a) when dealing with an application to amend the pleadings, which introduce a new case in the claim or defence, **on the eve of the trial,** the principles in *Yamaha Motor* are not the sole considerations;
>
> (b) the principles in *Yamaha Motor* applies to cases where the application to amend the pleadings is made at an early stage of the proceedings;
>
> (c) that there has to be a cogent and reasonable explanation in the applicant's affidavit as to why the application was filed late;
>
> (d) that the application to amend the pleadings is not a tactical manoeuvre;

(e) that the proposed amendment must disclose full particulars for the court to ascertain if there is a real prospect of success in proving the same; and

(f) that lateness in the application to amend the pleadings cannot necessarily be compensated by payment of costs.

(emphasis added)

[24] It is to be noted that in *Hong Leong Finance*, the defendant's application for amendment of their defence and counterclaim was filed two weeks before the first trial date and 13 years after the filing of the suit. The application itself was served on the plaintiff's solicitors three days before trial and thus giving the plaintiff no opportunity to file an affidavit in opposition. Whereas the facts in *Yamaha Motor* show that the plaintiff's application to amend their statement of claim was made about seven months after the original statement of claim was amended, and the trial had yet to commence.

[25] The Federal Court in *Hong Leong Finance* (at paras. 19 to 24) analysed the principles of amendment in English as well as Australian jurisdiction up to the year 2014 and found a universal move to discourage late filing of amendment application. With regards to the English law, the Federal Court in *Hong Leong Finance* referred to the case of *Hague Plant Ltd v. Martin Hartley Hague & Others* [2014] EWCA Civ 1609 which was decided post-Jackson reforms. This reform, which took place in April 2013, was carried out by Lord Justice Jackson in order to improve the UK's Civil Procedure Rules 1998 (CPR).

[26] As part of the Jackson reforms, the overriding objective of CPR was amended to provide that the court must deal with cases "justly and at proportionate cost" (CPR r. 1.1(1)), "saving expense" (CPR r. 1.1(2)(b)) and "allotting an appropriate share of court resources" (CPR r. 1.1(2)(e)). As a result, in the case of *Hague Plant Ltd* (*supra*), the Court of Appeal upheld the High Court's decision to refuse the claimant's application to re-amend its particulars of claim to include claims for dishonest breach of fiduciary duty and dishonest assistance despite the fact that no trial date had yet been fixed. HHJ Behrens concluded that the application to amend was nonetheless "late" having regard to the time that had passed and the work that had been done (including completion of defences and considerable time and effort on Part 18 exchanges). Briggs LJ endorsed this approach, recognising the difference between a "very late" amendment that risks jeopardising a trial date and a "late amendment" that would result in wasted existing work and significant additional effort and expense. The court clarified that lateness is a relative concept rather than an absolute one. A short, well-defined, properly explained, and fully detailed amendment made shortly before trial may be acceptable, while a lengthy, ill-defined, unfocused and unexplained amendment proffered several months before trial may be too late. (*Hague*

A *Plant Ltd* at [31] to [34]). This principle is followed in the cases of *Wani LLP v. Royal Bank Of Scotland Plc And Another* [2015] EWHC 1181, and *Bourke & Anor v. Favre & Anor* [2015] EWHC 277).

[27] In *CIP Properties (AIPT) Limited v. Galliford Try Infrastructure Limited (No. 3)* [2015] EWHC 1345 (TCC), the English High Court summarised the
B proper approach to amendments after the Jackson reforms as follows:

(i) the lateness of an amendment is a relative concept. An amendment is "late" if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the
C significant steps in the litigation which have been completed by the time of the amendment (para. 19(a));

(ii) an amendment can be regarded as "very late" if permission to amend threatens the continuation of the trial, even if the application is made some months before the trial is due to commence. Parties have a
D legitimate expectation that the trial dates will be met and not postponed without good reason (para. 19(b));

(iii) the history of the amendment, together with an explanation for its lateness, is a matter for the applicant and is an important factor in the balancing exercise. In essence, there must be a good reason for the delay
E (para. 19(c));

(iv) the particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly drawn or focused (para. 19(d));

F (v) the prejudice to the other party will, if the amendments are allowed, incorporate at one end of the spectrum, the simple fact of being "mucked around", to the disruption and additional pressure on their lawyers in the run-up to trial, and the duplication of cost and effort at the other. If allowing the amendments would necessitate the postponement of the
G trial, that may be an overwhelming reason to refuse the amendments (para. 19(e)); and

(vi) prejudice to the applicant, if the amendments are not allowed, will include its inability to advance his/her amended case, but that is just one factor to be considered. Moreover, if that prejudice has come about by
H the applicant's own conduct, then it is much less important in the balancing exercise (para. 19(f)).

[28] As analysed by the Federal Court in *Hong Leong Finance*, the English court's traditional approach was that amendments should be allowed, provided that any prejudice to the other parties could be compensated for in
I costs. This approach has gradually changed over the years to culminate in the current position, where the new starting point is whether there is any good reason for the lateness of the amendment.

[29] I however view that the English approach is too strict and conservative in its interpretation of what a "late" amendment entails. In the current English approach, an amendment is "late" if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation. However, this is not the legal position in Malaysia. As can be seen in the facts of *Hong Leong Finance*, the result of the appeal at the Federal Court goes towards the preservation of the trial itself. In particular, the Federal Court uses a higher spectrum of lateness, referred to as the 'eve of trial', in contrast to the English jurisdiction's approach of treating lateness as a relative concept. The phrase 'eve of trial' can be defined as the critical period immediately before a trial begins, marked by intense preparation and strategic decision-making. Therefore, it is aptly so that any applications taken during this time, to wit, including the decision to amend pleadings, should be closely scrutinised to ensure fairness and prevent any undue prejudice.

[30] I am of the considered view that the current position for an amendment application in Malaysia closely follows the approach in India: in that stricter scrutiny is imposed over amendments if they are made after a prescribed threshold, whilst maintaining a more liberal approach if amendment is made prior to the said threshold. Order VI r. 17 of India's Civil Procedure Code 1908 is reproduced herein:

> Order VI Rule 17.
>
> 17. Amendment of pleadings – The Court *may at any stage of the proceedings* allow either party to alter or amend his pleadings in such manner and on such terms as may be *just* and all such amendments shall be made as may be *necessary for the purpose of determining the real questions in controversy between the parties:*
>
> Provided that *no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.*
>
> (emphasis added)

[31] Therefore, upon commencement of trial, applicants in Indian courts have to explain the reasons for their delay and show why they could not have made such an application despite the exercise of due diligence. Perhaps it is the same burden our litigants face in order to introduce fresh evidence at the appeal stage.

[32] The situation in South Africa is arguably similar to that in India, where the courts establish specific thresholds, *ie*, "commencement of a trial", at which amendment applications are subject to greater scrutiny. In the case of *Randa v. Radopile Projects CC* [2012] (6) SA 126 (GSJ), the South Gauteng High Court affirmed the Magistrate's decision to dismiss the defendant's amendment application, which was made during trial, which was held about eight years after the suit was filed. Willis J held that, *inter alia*, as follows:

(i) that the commencement of a trial should be the essence upon which the courts' attitude towards applications for amendments to pleadings should be balanced (para. 4);

(ii) the further away the parties are from the commencement of the trial, the easier it should be for a party to obtain an amendment, and the deeper the parties are into a trial, the more difficult it should be (para. 4); and

(iii) the reasons for this are that, once a trial commences, costs increase exponentially and there are sometimes considerable logistical difficulties in securing the timeous attendance of witnesses at court. During the trial, the court will form certain impressions of witnesses and develop a sense in whose favour the balance of probabilities lies. Willis J stated that these factors mitigate against the more relaxed or liberal attitude towards amendments that may prevail before a trial commences (para. 5).

[33] Interestingly, Singaporean law has done away with the provision of O. 20 r. 5 in their 2014 Rules of Court and introduced O. 9 r. 14 in their 2021 Rules. Similar to India, their new rules on amendments establish a specific threshold at which amendment applications are subject to greater scrutiny:

> Amendment of pleadings (O. 9, r. 14)
>
> 14. (1) The Court may allow the parties to amend their pleadings.
>
> (2) In a special case, the Court may consider events that occurred after the originating claim is filed to be pleaded even though they do not relate back to the date of the filing of the originating claim.
>
> (3) **The Court must not allow any pleading to be amended less than 14 days before the commencement of the trial except in a special case.**
>
> (emphasis added)

[34] In the case of *Wang Piao v. Lee Wee Ching* [2023] SGHC 216, Goh Yihan JC held, at para. 11, that:

> ... I do not think that the ROC 2021 prescribes a more restrictive approach to amendments save for the one specific situation prescribed in O. 9 r. 14(3). For completeness, I likewise do not think that the Ideals, which, while prescribing for "expeditious proceedings", should be extrapolated to impose a more restrictive approach to amendments when there is only the one express reference to such an approach in O. 9 r. 14(3). As such, the prevailing principles in relation to amendments as established under the ROC 2014, other than the amendment of any pleading less than 14 days before trial, should continue to apply for amendments sought under the ROC 2021 ...

[35] Our courts are, in principle, reluctant to disallow even a late-stage amendment and do not strictly interpret what constitutes an acceptable reason for bringing a late amendment. It is only concerning the question of

prejudice that the applicant must demonstrate that their amendment application is *bona fide*. As long as the court believes the amendment is not made in bad faith and that the opponent can be restored to their original position for the purposes of justice, typically through a cost order or postponement, the amendment will usually be permitted. (See *United Overseas Bank Limited v. Heap Huat Rubber Co Sdn Bhd* [1993] 3 CLJ 552, *Sek Ann Thong v. Tamparuli Granite Quarry (Sabah) Sdn Bhd & Anor* [1997] 1 CLJ Supp 239; [1996] MLJU 244, *Palaniappan Kotayan v. Universiti Pertanian Malaysia* [1995] 1 CLJ 693; [1995] 1 MLJ 353, *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126; [1987] 1 MLJ 230, *Mohd Nor Ismail v. Mohd Zain Abdullah & Anor* [1987] CLJU 68; [1987] 1 LNS 68; [1988] 2 MLJ 384).

[36] I believe that the decision in *Hong Leong Finance* did not change this principle; it merely enhanced the scrutiny by incorporating additional factors to be considered in the event that such an amendment is applied at the eve of trial. Thus, based on *Hong Leong Finance*, I am of the view that, similar to the jurisdiction in South Africa, India and Singapore, there is a clear distinction between an ordinary amendment application and those applications made at the eve and upon commencement of trial.

[37] Based on the correlation drawn from the facts of the *Hong Leong Finance* in Malaysia and the provisions in Singapore's 2021 Rules of Court, both jurisdictions establish a significant threshold regarding the timing of amendment applications relative to the trial date. In Malaysia, an application made two weeks before the trial is deemed to be made 'eve of trial', indicating a critical period where amendments are subject to heightened scrutiny. Similarly, Singapore's 2021 Rules of Court specify a cut-off point of 14 days before the commencement of trial, suggesting that amendments filed within this timeframe are also considered late and subject to rigorous evaluation.

[38] This reasoning underscores the importance placed by both jurisdictions on maintaining procedural fairness and efficiency in trial preparation. The 14-day cut-off period serves to minimise disruptions to trial schedules, ensure adequate preparation time for all parties involved, and uphold the integrity of the judicial process by balancing the need for flexibility with the imperative of procedural discipline.

[39] Thus, I am of the considered view that ordinary amendments should be dealt with exactly the same as in the past, namely based on the test in *Yamaha Motor, ie*, that the amendment should always be allowed unless the application to amend is *mala fide*; unless such amendment would cause an injustice and prejudice to the other side which cannot be compensated by costs; and that the amendments would turn the suit from one character into a suit of an inconsistent character.

[40] With regards to 'eve of trial' amendments, in addition to the *Yamaha Motor* test, *Hong Leong Finance* requires the consideration of additional factors. Specifically, the court should assess whether the applicant's affidavit provides a cogent and reasonable explanation for the delay in filing the application; to examine whether the application to amend is not a tactical manoeuvre; examine that the proposed amendment discloses full particulars to enable the court to ascertain if there is a real prospect of success in proving the same; and that lateness in the application to amend the pleadings cannot necessarily be compensated by payment of costs.

[41] Applying the above principles to the factual matrix of our case, I am of the considered view that the plaintiffs' amendment application, made six months after the claim was filed and six months before the trial date, was submitted well before the threshold identified in *Hong Leong Finance*. Based on the defendant's submission, the delay of three months is said to have occurred from the realisation of error or inadvertence (on 14 June 2023) till the filing of the amendment application (on 13 September 2023). I nevertheless do not consider this delay to amount to the 'eve of trial' delay as set out in *Hong Leong Finance.* Parenthetically, the three-month delay raised by the defendant should be examined in reference to the '*bona fide*' limb as set out in *Yamaha Motor*. Consequently, the applicable standard of evaluation for the current amendment application must be solely based on the test established in *Yamaha Motor*, and I am not required to consider the additional considerations outlined in *Hong Leong Finance*.

Compliance With The Standard Of Evaluation

[42] Having established that the applicable test pertains only to *Yamaha Motor*, the relevant factors to be examined are as follows:

Whether The Application Is Bona Fide

[43] The plaintiffs argue that the proposed amendment is fairly simple and straightforward as the charge forms part of the facilities. On the other hand, the defendant argues that the proposed amendment is not made in good faith as the plaintiffs were aware of the existence of the charge, and only chose to include the charge in the reliefs sought without incorporating how the charge was created in the body of the statement of claim. Reference is made to the cases of *Poh Chee Leng & Anor v. Cheah Siew Huen & Anor* [2019] CLJU 1226; [2019] 1 LNS 1226; [2019] MLJU 887, and *Kerajaan Negeri Selangor v. Syarikat Bekalan Air Selangor Sdn Bhd; Kerajaan Malaysia (Third Party)* [2012] CLJU 979; [2012] 1 LNS 979.

[44] The defendant's learned counsel posits that such move would also result in the plaintiffs not having to mention their existing affirmation of repayment obligation as the charge made in 2022 was an additional security given by the plaintiffs upon affirming their repayment obligation on the

existing facility made in 2020. It is contended by the defendant that neither the original statement of claim nor the amended statement of claim makes any reference to the charge (notwithstanding that the charge was already available at the time the plaintiffs commenced this action) but merely mentions "the terms imposed" by the defendant during the 2022 rescheduling.

[45] I am of the view that the master agreement is to be read together with the supplemental agreement (which introduced the charge). This is clear in cl. 2.1 of the supplemental agreement which states as follows:

> The Facility Agreement and this Supplemental Agreement shall, to the extent applicable, be read and construed as one instrument.

[46] The plaintiffs' decision to omit mention of the supplemental agreement in the body of their amended statement of claim is justifiable, as it aligns with their interpretation of the claim. It is entirely within their discretion to structure their plaint in this manner. From the amended statement of claim, it is clear that the essence of the plaintiffs' claim is that all securities related to the loan should be considered cancelled. This necessarily includes the charge, which, although created in a subsequent agreement, nonetheless forms part of the master agreement.

[47] Regarding the three-month delay from the realisation of the 'inadvertence' to the application, I am of the view that this does not constitute an inordinate delay given the circumstances, considering the stage of the proceedings and the finding of no *mala fides* on the plaintiffs' part.

[48] I am thus of the considered view that the proposed amendment is made in good faith, aiming to enhance the clarity and completeness of the amended writ and statement of claim, and to address the real question in controversy between the parties.

Whether The Prejudice Caused To The Other Side Can Be Compensated By Costs

[49] On this issue, that the defendant argues that they are prejudiced as the position has been superseded through the injunction application and subsequent injunction order affecting 13 securities, wherein the proposed amendment is being used as a backdoor measure to include the charge into the existing injunction order.

[50] The defendant argues that the plaintiffs are estopped from taking inconsistent positions by suggesting that the charge was always intended to be included in the list of 13 securities, given that the plaintiffs chose not to include the said charge from the outset of the civil suit. Reference is made to the cases of *Phuah Beng Chooi & Ors v. Koh Heng Jin & Ors And Other Cases* [2006] 8 CLJ 364; [2007] 2 MLJ 458, and *Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16; [2012] 1 MLJ 761.

Further, the defendant argues that such prejudice cannot be compensated with costs as the amendment would result in the plaintiffs halting the foreclosure action against the charge.

[51] I believe that my predecessor correctly determined during the clarification session on 29 May 2023 that the charge does not form part of the 13 securities. Therefore, this undermines the defendant's argument that the proposed amendment is a backdoor measure to include the charge in the existing injunction order.

[52] As to the defendant's contention that the proposed amendment would halt the foreclosure proceeding, I am of the view that such proceeding would be govern by a different and rather strict test as set out under the "cause to the contrary" principle based on s. 256(3) of the National Land Code ('NLC'), and the Supreme Court decision in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77. Therefore, if an injunction is to be applied to the charge in this suit, it would need to be conducted separately and would involve a different test compared to those applicable to the initial 13 securities, none of which involve a charge under the NLC.

[53] In any event, based on the court's record, the defendant (plaintiff in the foreclosure proceeding) had successfully obtained an order for sale against the charge on 12 December 2023, with auction date fixed on 20 June 2024. (See the case of *MIDF Amanah Investment Bank Bhd v. Vahana Offshore (M) Sdn Bhd* [2024] CLJU 31; [2024] 1 LNS 31; [2024] MLJU 28, as decided by Leong Wai Hong JC).

[54] Therefore, based on the foregoing, it can be concluded that permitting the proposed amendment would not unfairly prejudice the defendant, save perhaps for the need to amend their defence. The changes are not anticipated to place the defendant at a disadvantage in presenting their defense or cause undue harm to their position in the proceedings.

Whether The Amendments Would Not In Effect Turn The Suit From One Character Into A Suit Of Another And Inconsistent Character

[55] Here, the defendant's learned counsel argues that the proposed amendment will change the character of the dispute in the civil suit in that it expands the scope of the dispute in which the plaintiffs had previously limited the same. Reference is made to the cases of *Muhammad Amin Anuar v. Seow Jing Hui & Ors* [2023] 8 CLJ 475; [2023] MLJU 1368, and *Apparatech (M) Sdn Bhd v. Ng Hock Chong & Anor* [2006] 1 CLJ 60; [2006] 2 MLJ 61.

[56] Having examined the factual matrix of this case, I am of the considered view that the proposed amendment does not transform the nature of the suit from its original character into one that is inconsistent or fundamentally different. The inclusion of the additional security, *ie*, the

charge, which is part of the facility granted to the plaintiffs, is in line with the overall nature and purpose of the amended writ and statement of claim. Such an amendment, *ie*, to include the charge which was inadvertently omitted from the amended writ and statement of claim, is necessary for determining the real question in controversy between the parties.

[57] Even if it amounts to adding or substituting a new cause of action and therefore slightly changing the character of the suit, applying *Yamaha Motor*, I am of the view that such move is still permissible as the said new cause of action arises out of the same facts and the same transaction as the cause of action in respect of the other 13 securities, which is already part of the amended statement of claim.

Decision

[58] In light of these considerations, I have allowed the plaintiffs' application to amend their amended writ & statement of claim as set out in Annexures A and B of encl. 98. To ensure that the amendments do not operate unfairly to the defendant, I have imposed cost in the sum of RM3,000 to be paid by the plaintiffs to the defendant within 14 days.